B. DIALDAS & CO. PTE. LTD.

v.

SIN SIN & CO. & ORS.

HIGH COURT BORNEO, MIRI
CHONG YIK LIONG J
[SUIT NO. MR 30 OF 1981]
21 JUNE 1983

CIVIL PROCEDURE: *Judgment in default of appearance - Application to set aside - Discretion of Court - How exercised - "Defence on the merits" - Meaning.*

The application was by the 1st and 3rd defendants for an order under O. 13 r. 8 of the Rules of the High Court, 1980, that the judgment in default of appearance obtained by the plaintiff be set aside on the ground that they had a good defence on the merits. The judgment in default was obtained on 16 March 1982. The application to set aside was made on 18 December 1982. The plaintiff's claim was for the price of goods sold and delivered or alternatively upon a judgment of the Subordinate Court in Singapore obtained by the plaintiff against the first defendants firm.

Held:

[1] The Court had unfettered discretion to set aside a judgment entered in default of appearance. Order 13 r. 8 does not prescribe the time limit within which the application for relief must be made, therefore delay or lapse of time is no bar to application and does not preclude the Court from the exercise of the discretion in a fit and proper case.

[2] As there was no dispute that the judgment was a regular one, the only question to be decided was whether the affidavits in support of the application disclosed a triable issue. The Court's discretion under O. 13 r. 8 must be exercised in accordance with the settled principles, and if the judgment is a regular one, then there must be an affidavit of merits stating facts showing a "defence on the merits", that is, "a defence which discloses an arguable and triable issue". *(Farden v. Richter* [1889] 23 QBD 124; *Evans v. Bartlam* [1937] AC 473; *Burns v. Kondel* [1971] 1 Lloyd's Law Reports 554).

[3] The facts deposed to in the two affidavits of the 3rd defendants were not enough to raise a triable issue in respect of the plaintiff's claim for goods sold and delivered.

[4] Regarding the plaintiff's alternative claim, non-submission to the jurisdiction of the Singapore Court was sufficient to raise a triable issue as to whether the Singapore judgment was binding on the 1st and 3rd defendants.

[5] However, in view of the fact that no defence on the merits had been shown to the original claim for goods sold and delivered, the success on the alternative claim alone could not afford a sufficient ground to set aside the judgment. A triable issue must be shown on each of the alternative claims.

[Application dismissed.]

Cases referred to:
Farden v. Richter [1889] 23 QBD 124
Evans v. Bartlam [1937] AC 473
Burns v. Kondel [1971] 1 Lloyd's Rep 554

Legislation referred to:
Rules of the High Court 1980, O. 13 r. 8

Other sources referred to:
Halsbury's Laws of England, 3rd Edn., Vol. 35, p. 332, 346

For the plaintiff - George Lim; M/s. Battenberg & Talma
For the 1st and 3rd defendants - M.S. Sandhu; M/s. Sandhu & Co.

JUDGMENT

Chong Yik Liong J:

This is an application by the 1st and 3rd defendants by way of a summons in chambers dated 18 December 1982, for an order that the judgment in default of appearance obtained by the plaintiff against them on 16 March 1982 be set aside.

The facts leading to the present application are briefly these. On 25 February 1981, the plaintiff issued a writ of summons against the four defendants herein (the 1st defendant being sued as a firm, and the 2nd, 3rd and 4th defendants as partners in the 1st defendant firm) claiming S$4,714.65 equivalent to RM4,938.60 for the price of goods sold and delivered or alternatively upon judgment of the Subordinate Court in Singapore, which was obtained by the plaintiff against the 1st defendant firm on 20 September 1980. The writ was duly served on the 1st and 3rd defendants on 8 April 1981. No appearance was entered by either of them and on 16 March 1982, the plaintiff entered judgment against the 1st and 3rd defendants for the amount claimed and costs in default of appearance. No steps were taken by the 1st and 3rd defendants until 18 December 1982 when they took out a Summons in Chambers to set aside the default judgment on the ground that they had a good defence on the merits.

Order 13 r. 8 of the Rules of the High Court, 1980 gives a completely unfettered discretion to the Court to set aside a judgment entered in default of appearance. The rule does not prescribe the time limit within which the application for relief should be made, and it is this that leads me to believe that delay or lapse of time is no bar to the application and does not preclude the Court from the exercise of the discretion in a fit and proper case. However, it appears to me that the Court's discretion under that rule must be exercised in accordance with the settled principle that if the judgment is a regular judgment, then it is an almost inflexible rule that there must be an affidavit of merits stating facts showing a defence on the merits (see *Farden v. Richter* [1889] 23 QBD 124 and *Evans v. Bartlam* [1937] AC 473), and 'defence on the merits" as explained by Lord Denning, MR in *Burns v. Kondel* [1971] 1 Lloyd's Rep 554, means "a defence which discloses an arguable and triable issue".

There is no dispute that the judgment which the present application seeks to set aside was a regular judgment and the question, which I have to decide in this application is whether the affidavits in support thereof have disclosed a triable issue, so as to justify the Court to exercise the discretion to grant the relief sought in this application.

With regard to the plaintiff's claim for goods sold and delivered, the 3rd defendant in his affidavit affirmed on 24 September 1982, merely stated (1) that he did not order the goods, and (2) that the goods were never delivered to or received by him. It is only in his second affidavit affirmed on 24 January 1983 in reply to the affidavits of Chew Peng Hui, plaintiff's advocate, and Rup Lal s/o Devidass, plaintiff's salesman, respectively affirmed on 12 & 14 January 1983, that the 3rd defendant added that he was at the material time the sole proprietor of the 1st defendant firm, having sole management and control of its business, and that the 2nd and 4th defendants, having retired respectively on 26 January 1955 and 31 December

1972, were not in any way concerned with the business of the 1st defendant firm when the goods were alleged to have been purchased and, therefore, could not have offered the goods, received them or agreed to make payment of the purchase price thereof on behalf of the 1st defendant firm. Learned Counsel for the 1st and 3rd defendants submitted that these facts and those stated in the first affidavit were sufficient to show that the 1st and 3rd defendants had a defence on the merits, such as would entitle them to the order to set aside the default judgment. I would have agreed with this submission had it not been for the presence of other facts to which I shall shortly refer, and which had not been disputed or adequately displaced by the 3rd defendant in his second affidavit in reply.

Rup Lal had in his affidavit deposed that he personally obtained an order from a partner of the 1st defendant firm for the purchase of the goods therein mentioned and that the said goods were shipped to the 1st defendant firm in two shipments under two bills of lading respectively exhibited thereto as "RLD1" and "RLD2". However, the 3rd defendant in his second affidavit in reply only stated to the effect that no order for the said goods was ever made by or on behalf of the 1st defendant firm and that the said good were never delivered to the 1st defendant firmor received by or on behalf of the 1st defendant firm; but he was completely silent on the two bills of lading under which the said goods were said to have been shipped to the 1st defendant firm. In Halsbury's *Laws of England*, 3rd Edn. Vol. 35 at p. 332, it is stated that a bill of lading is "a symbol of the right of the property in the goods specified therein. Its possession is equivalent to the possession of the good themselves, and its transfer, being a symbolical delivery of the goods, has by mercantile usage the same effect as an actual delivery in the same circumstances"; and at p. 346, it is stated that "the issue or transfer to the buyer of a bill of lading operates *prima facie* as a delivery to the buyer of the goods shipped". In the present case, the two bills of lading were respectively issued to the 1st defendant firm, without any reference for delivery to its order or assigns, and the fact that they were so issued was not disputed by the 3rd defendant. In the light of this, I am of the view that the 3rd defendant's reply in terms of a general denial was not sufficient displace the *prima facie* evidence of delivery of the goods shipped to the 1st defendant firm under the two bills of lading.

Further, Rup Lal had also described the events following the shipment of the goods, with a view to showing that there could not be a defence on the merits. Paragraph 4 of his affidavit reads as follows:

> 4. After the said shipments were made, the plaintiffs made several demands both oral and in writing to the 1st defendants for the payment of the price of the aforesaid goods. In reply to these demands, the 1st defendants either requested more time to pay or assured the plaintiffs that they would pay. During this time, the 1st defendants never denied that they ordered the goods nor was the fact of delivery of the goods and the receipt of the same ever challenged by the 1st defendants."

In reply, the 3rd defendant stated in para. 3(3) of his second affidavit as follows:

> 3. I deny that I had agreed to pay for the goods in question or requested for more time to do so. Nor did I authorise any person to do the same on behalf of the said firm.

To my mind, the reply by the 3rd defendant in terms as stated above was wholly inadequate to show the non-existence of the facts relating to the conduct of the parties subsequent to the shipments of the goods, in that it impliedly supported the fact that demands for the payment of the price of the goods had, in fact, been made by the plaintiffs, and it did not at all displace the fact that the 1st defendant firm never denied ordering the goods nor the delivery and receipt of the goods during the time when demands for payment were made.

By reason of the failure on the part of the 3rd defendant to challenge or to state sufficient fact to displace the existence of the facts to which I have referred to above, I find that the facts deposed to in his two affidavits are not enough to raise a triable issue in respect of the plaintiff's claim for goods sold and delivered.

As to the plaintiff's alternative claim upon the judgment of the Subordinate Court in Singapore, the 3rd defendant in his first affidavit stated that he did not appear in that action nor did he submit to the jurisdiction of that Court, although he was served with the Summons at Miri to appear before that Court. It appears that the 1st and the 3rd defendants were at the material time not resident or carrying on business in Singapore where the judgment sued on was obtained in default of appearance and, in the light of this, I am of the view that non-submission to the jurisdiction of the Singapore Court is sufficient to raise a triable issue as to whether the Singapore judgment is binding on the 1st and 3rd defendants. However, in view of the fact that no defence on the merits has been shown to the original claim for goods sold and delivered, the success in raising a triable issue on this alternative claim alone cannot afford a sufficient ground for the grant of the order setting aside the judgment obtained in default of appearance in this action. To entitle the defendant applicants herein to the order sought, there must be shown that there is a triable issue on each of the alternative claims. Success in raising a triable issue on one or the other of the alternative claims is not enough.

For reasons stated above, I would dismiss this application with costs to the plaintiff to be taxed.

Also found at [1983] 2 CLJ 273